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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MICHAEL BROOKS, Plaintiff and Appellant, v. QUANTUM SERVICING CORPORATION, Defendant and Respondent.	B234181 (Los Angeles County Super. Ct. No. LC088673)

APPEAL from a judgment of the Superior Court of Los Angeles County, Louis M. Mesinger, Judge. Affirmed.

Law Offices of Jonathan L. Nielsen and Jonathan L. Nielsen for Plaintiff and Appellant.

Smith Dollar, Rachel M. Dollar, Sherrill A. Oates and Antonio L. Cortés for Defendant and Respondent.

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Plaintiff appeals from a judgment entered in favor of defendant in this breach of contract action after defendant's motion for summary judgment was granted. The trial court found that plaintiff failed to raise a material factual question regarding the existence of a contractual relationship between plaintiff and defendant. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

There are no material disputes about the following facts:

Plaintiff and appellant Michael Brooks (Brooks) entered into a written loan agreement with EMB Mortgage Corporation (EMB) on or about October 20, 1998. Under the agreement, Brooks borrowed $388,600 and agreed to make monthly payments to EMB. As security for the loan, Brooks executed a deed of trust against real property in Woodland Hills, California, naming EMB as the sole beneficiary.

Defendant and respondent Quantum Servicing Corporation (Quantum) began servicing the loan in September 2005.

In October 2002, after falling behind on his payments, Brooks filed the first of five successive bankruptcy petitions (the substance of those proceedings is largely irrelevant here). In October 2007, Brooks entered into a forbearance agreement with Quantum.

Brooks initiated the instant action in February 2010.[1]

In the course of one of Brooks's bankruptcies, Quantum submitted a declaration by Krystal Almaraz, an agent of Quantum, stating that payments on the loan were "for the benefit of *Quantum Servicing Corporation*."

The operative second amended complaint (SAC) alleged, among other things, that Brooks had a contract with Quantum which was breached by Quantum's purported accounting irregularities and the subsequent foreclosure of Brooks's home.[2] A copy of

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[1] Subsequently, Brooks filed his fifth bankruptcy petition. That action did not stay prosecution of this case, or the foreclosure of Brooks's home, because Brooks had filed two or more bankruptcy petitions in the previous year which were subsequently dismissed, precluding an automatic stay pending bankruptcy. (11 U.S.C. § 362(c)(4)(A)(i).)

[2] Brooks also alleged causes of action and sued a number of other entities. None of those claims remain at issue and no other defendant is a party to this appeal.

the deed of trust was attached to the SAC. The record does not contain a copy of the alleged loan agreement between Brooks and Quantum.

In due course, Quantum sought summary judgment contending, in pertinent part, that Brooks could not establish any element of his cause of action for breach of contract. The trial court agreed with Quantum, found that Brooks had raised no triable issue of material fact as to the existence of a contractual relationship, and granted the motion for summary judgment.

DISCUSSION

I. The Motion for Summary Judgment was Properly Granted

Brooks maintains that the trial court erred in ruling that, as servicer, Quantum had no contractual relationship with Brooks.

A. Standard of review.

"We review a grant of summary judgment de novo; we must decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. [Citations.]" (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.)

Under the burden-shifting schemata of summary judgment, each party bears the burden of production. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) We view the admissible evidence in the light most favorable to Brooks. (*Barber v. Chang* (2007) 151 Cal.App.4th 1456, 1463.) If no triable issue of material fact exists as to one or more elements of a cause of action, we may affirm the summary judgment if it is correct on any applicable legal ground, whether or not adopted by the trial court. (*Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1071.)

B. The record does not support Brooks's theory that he had a contractual relationship with Quantum.

In pertinent part, the SAC alleges that the loan agreement (which is not included in the record) constitutes a binding contract with Quantum. In support of its motion for summary judgment, Quantum noted that the deed of trust identified only Brooks and EMB as parties to the underlying loan. Quantum also submitted a declaration by one of

its vice presidents, Glenn Brooks (V.P. declaration). The V.P. declared that Quantum was only a servicer of Brooks's loan.

According to Brooks, the existence of his purported contract with Quantum is evidenced by the deed of trust, which supports an inference that Quantum was a party to the contract. Brooks maintains his argument is bolstered by a declaration filed by Quantum in one of Brooks's myriad bankruptcy petitions stating that payments on the loan were "for the benefit" of Quantum. Brooks also points to his own declaration purportedly submitted in opposition to the motion for summary judgment.[3] None of Brooks's purported evidence is sufficient to evidence the existence of a contract with Quantum.

i. The V.P. Declaration

In support of its motion for summary judgment, Quantum pointed first to the deed of trust, which identifies only Brooks and EMB as parties to the underlying contract. Quantum also proffered its V.P. declaration, attesting to the fact that Quantum was merely a loan servicer.[4]

Brooks now contends that the trial court erred by "improperly accept[ing Quantum's] self-serving" V.P. declaration, which he asserts is insufficient to meet Quantum's burden of persuasion. Summary judgment is not an occasion for the trial court to weigh the credibility of admissible evidence and we decline Brooks's invitation to do so on appeal. (Code Civ. Proc., § 437c, subd. (e).) Moreover, there is no support

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[3] Brooks's declaration is not in the record and, in its absence, cannot be relied upon to find that the trial court erred in its judgment, as discussed below. (*Stasz v. Eisenberg* (2010) 190 Cal.App.4th 1032, 1039 ["in the absence of . . . [necessary] documents, we presume the judgment is correct"].)

[4] A loan servicer collects payments due under the loan agreement and performs other mortgage loan servicing obligations on behalf of the holder of the note. (See *Gomes v. Countrywide Home Loans, Inc.* (2011) 192 Cal.App.4th 1149, 1152, fn. 2.) The deed of trust provides that an unidentified loan servicer "collects monthly payments due under the Note and this Security Instrument" and that the loan servicer of Brooks's loan may change as a result of the sale of the loan or for reasons "unrelated to a sale of the Note."

for Brooks's assertion that the declaration was inadmissible on the basis that it was "'self-serving,'" because there is no evidence that the declaration contradicts any prior discovery responses. (See *Scalf v. D. B. Log Homes, Inc.* (2005) 128 Cal.App.4th 1510, 1521–1522 [A trial court may disregard a party's self-serving declaration submitted in opposition to summary judgment that contradicts the party's discovery responses].) In any event, there is no indication that Brooks objected on this basis at the trial court. He cannot now claim that the trial court erred in failing to make a ruling it was not asked to make. (Evid. Code, § 353.)

ii. The Deed of Trust

Brooks mischaracterizes the V.P. declaration as the "only evidence" Quantum submitted to support its assertion that no contract existed between itself and Brooks. Brooks ignores the fact that Quantum also relied on the deed of trust, which identifies Brooks and EMB as the sole parties to the underlying agreement.

Although neither side identifies any California appellate case having addressed this issue, federal courts applying California law have brusquely dismissed the notion that loan servicers, as agents for the holder of the loan, are parties to deeds of trust or the mortgage, or that a loan servicer is in privity with the holder of the loan. (See, e.g., *Conder v. Home Savings of America* (C.D.Cal. 2010) 680 F.Supp.2d 1168, 1174 ["The fact that Aurora [servicer] entered into a contract with HSA [mortgagee] to service Plaintiff's loan does not create contractual privity between Aurora and Plaintiff"]; *Lomboy v. SCME Mortg. Bankers* (N.D.Cal. May 26, 2009, No. C-9-1160 SC) 2009 U.S. Dist. Lexis 44158 at p. 14 ["a loan servicer . . . is not a party to the Deed of Trust itself"]; *Connors v. Home Loan Corp.* (S.D.Cal. May 9, 2009, Civ. No. 08cv1134) 2009 U.S. Dist. Lexis 48638 at p. 17 ["Plaintiff has failed to assert or differentiate the roles and functions of defendants [servicer] ASC and [mortgagee] US Bank. . . . If ASC is a loan servicer, ASC is not a party to the Deed of Trust itself"].)

No contrary conclusion is required here. Quantum is not directly identified as a party to the deed of trust, which provides that an unidentified and changeable loan servicer will collect monthly payments due under the note and deed of trust. Nor is there

any support for the inference that the deed of trust itself supports a theory that the note—which was not submitted to the trial court—establishes a contractual relationship between Brooks and anyone but the holder of the note. Rather, the deed of trust specified the "Lender" (EMB) as being responsible for application of payments made by the borrower. A lender may delegate tasks to a servicer without establishing privity of contract between the servicer and the mortgagor, and thereby rendering the servicer liable for breach of contract. "[A]n agent cannot be held liable for breach of a duty which flows from a contract to which he is not a party." (*Filippo Industries, Inc. v. Sun Ins. Co.* (1999) 74 Cal.App.4th 1429, 1443.)

Quantum's reliance on the deed of trust, coupled with its V.P.'s declaration and Brooks's failure to produce the note, was sufficient to meet its burden of persuasion on summary judgment that no contract exists as between Quantum and Brooks.[5]

iii. Quantum's Bankruptcy Declaration and the Forbearance Agreement

In response to Quantum's evidence, Brooks noted he had paid substantial sums to Quantum, a fact which would "fly in the face of the argument that they were not parties to the contract." Brooks also cited a declaration submitted by Quantum in one of

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[5] On appeal, Brooks argues he established the existence of a contractual relationship with Quantum on an "undisclosed principal" theory. This argument was not briefed in opposition to the motion for summary judgment and only raised in passing at oral argument on the motion. Parties may generally not raise arguments on appeal which were not presented at the trial court below, unless the issue is "'purely a question of law on undisputed facts.'" (*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 813.)

Even assuming the issue was raised in the trial court and implicated only undisputed facts, where an actor "'disclose[s] the principal at the time of making the contract'" and discloses that he acts on the principal's behalf, the agent is excused from liability. (*J & J Builders Supply v. Caffin* (1967) 248 Cal.App.2d 292, 295.) Moreover, agent liability requires the existence of a contract brokered by the agent as a prerequisite to establishing its liability on that contract. (See *ibid.*) Brooks's undisclosed principal argument is unavailing: the only contract in the record brokered by Quantum is a forbearance agreement (discussed below), which discloses that Quantum acts on behalf of the holder of the loan.

Brooks's bankruptcy actions, in which Quantum stated that appellant's payments were "for the benefit of *Quantum Servicing Corporation*."

Brooks contends a contract may be implied from the circumstances, including his payments to Quantum. But even an implied contract requires mutual assent. (*Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1977) 69 Cal.App.3d 268, 275.) Courts have dismissed similar arguments that loan servicers formed contractual relationships with borrowers for lack of assent. (See *Lomboy v. SCME Mortg. Bankers, supra*, 2009 U.S. Dist. Lexis 44158 at p. 14 (N.D. Cal. 2009) [no contract can be implied from the fact that the loan servicer receives fees, and plaintiff failed to plead anything constituting a meeting of the minds].)

The only indication in the record of *any* mutual assent between Brooks and Quantum is found in a forbearance agreement.[6] Brooks, however, would be estopped from arguing that the forbearance agreement is evidence of mutual assent, as he maintains that agreement is void because he signed it under duress. In any event, assuming the forbearance agreement is valid, it evidences nothing more than mutual assent to *that* contract, which was fully performed by both parties. Further, the forbearance agreement simply limited Quantum's rights as authorized by the holder of the loan; it did not purport to establish a new relationship or change the existing relationship between Brooks and Quantum, the servicing agent.

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[6] The forbearance agreement states that "[e]xcept as otherwise provided in this Agreement, this Agreement *shall not be deemed to change the terms* of the Note and the Security Instrument you executed in connection with your Loan." (Italics added.) The agreement required Brooks to continue making regular monthly loan payments in addition to the payments to Quantum to cure the arrearage. The forbearance agreement provides that if Brooks made all the payments required by that Agreement, but failed to "bring the loan current . . ., Servicer [Quantum] may exercise remedies" up to and including foreclosure. It further noted that Quantum acted as "the servicer of your Loan with authority from . . . the Holder/Owner of [Brooks's] Loan." In short, the forbearance agreement limited Quantum, from exercising remedies on behalf of the holder of the loan, but did not create a new contractual relationship between Brooks and Quantum or alter the existing contractual relationship between Brooks and the holder of the loan.

To the extent that the deed of trust might indicate mutual assent, Quantum was not a party to that agreement. Moreover, the deed of trust indicates that the holder of the note may, for a variety of reasons, specify a new servicer to collect payments due under the loan, indicating that the loan servicer is an agent of the holder of the loan, not a separate party to the agreement.

iv. Brooks's Declaration and the Notice of Default

Finally, Brooks argues that his own declaration, purportedly submitted in opposition to Quantum's motion for summary judgment, contradicts Quantum's assertion that it was not a holder of the note. That declaration, however, is not included in the appellate record.

As appellant, Brooks has an affirmative duty to demonstrate prejudicial error on an adequate record. (*Conner v. Rose* (1963) 219 Cal.App.2d 327, 329.) We presume the record includes all matters material to deciding the issues raised on appeal. (Cal. Rules of Court, rule 8.163; *Hillman v. Leland E. Burns, Inc*. (1989) 209 Cal.App.3d 860, 864.) "When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362, 364.)[7]

We are aware that Brooks attempted to designate a "Declaration/Exhibit Book 3/25/11" for inclusion in the appellate record. Not surprisingly, his reference to this exhibit book was wholly insufficient to assist the clerk to prepare a complete or adequate record, as exhibits must be specified by number or letter in the notice of designation to be included in the record. (Cal. Rules of Court, rule 8.122(a)(3).) Moreover, parties on appeal have an affirmative duty to review the record and insure that it is complete and accurate. Where, as here, there is an *omission* from the record, the responsibility of

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[7] Brooks's failure to assure a complete record is compounded by his failure to comply with California Rules of Court, rule 8.204(a)(1)(C), which requires references to the volume and page number of the record. Brooks failed to identify the location even of evidence which is purportedly in the record.

directing the clerk to correct the record lies with the parties. (Cal. Rules of Court, rule 8.155(b).) "[I]t is not the responsibility of this court to obtain the documents necessary to consider the parties' arguments on appeal. We have frequently used our discretionary authority . . . to augment the appellate record with documents contained in the trial court record that were omitted by the parties, through mistake or neglect, in order to assist us in reviewing appeals on their merits. But we are by no means required to do so." (*State Comp. Ins. Fund v. Walldesign Inc.* (2011) 199 Cal.App.4th 1525, 1528, fn. 1.) The omission of crucial documents undermines Brooks's ability to demonstrate error. We "decline to find error on a silent record and thus infer that substantial evidence . . . [on the disputed issues] was before the . . . court." (*Haywood v. Superior Court* (2000) 77 Cal.App.4th 949, 955.)

Error is never presumed on appeal. On the contrary, appealed orders and judgments are presumed correct, and appellant must overcome this presumption by affirmatively showing error on an adequate record. (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1140–1141; *Stasz v. Eisenberg*, *supra*, 190 Cal.App.4th at p. 1039.) "It would indeed be both a novel and an unhappy departure from accepted appellate practice to sanction the presentation by an appellant of so inadequate a record that the reviewing court must draw questionable inferences, speculate, or indulge in 'presumptions' concerning" the record before the trial court. (*Conner v. Rose*, *supra*, 219 Cal.App.2d at pp. 328–329.) Brooks failed to ensure that pivotal evidence was contained in the record before this Court, and cannot now rely on that missing evidence to create a question of material fact.

II. Motion for Sanctions

Quantum filed a motion on appeal seeking sanctions against Brooks for filing a frivolous appeal. (Code Civ. Proc., § 907.)

Sanctions are appropriately imposed where the moving party can demonstrate that an appeal is frivolous under a subjective or objective standard. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649–651 (*Flaherty*).) Sanctions are proper, under the subjective standard, if an appeal is undertaken to advance an improper motive—that is,

"to harass the respondent or delay the effect of an adverse judgment." (*Id.* at p. 650.) Under the objective standard, sanctions may be in order if the issues on appeal are "indisputably" meritless; that is, "when any reasonable attorney would agree that the appeal is totally and completely without merit. [Citation.]" (*Ibid.*)

Brooks's appeal is far from a model of clarity or refined argument, even discounting his failure to ensure that the record before this court was complete. Nonetheless, we find it falls shy of the high burden meriting sanctions. Quantum argues that sanctions are in order because Brooks inappropriately raised the issue of undisclosed principal on appeal, an issue he failed to brief below. We note, however, that Brooks's counsel *did* raise the specter of an undisclosed principal argument at the hearing on Quantum's motion for summary judgment, even though that argument was never developed or briefed.

Quantum also contends that Brooks's appeal is meritless because it addresses only one substantive prong of a contract claim: whether a contractual relationship exists between the parties. Brooks's singular focus on this issue falls short of establishing that the appeal is meritless. The trial court also focused on that single issue and granted summary judgment without addressing whether triable issues existed as to remaining elements of Brooks's nonexistent contract claim. Brooks's narrow focus here is risky, but not entirely misplaced. In sum, we find no compelling evidence of subjective or objective bad faith on Brooks's part. This appeal presented Brooks a final chance to salvage his case, and there is no indication he appealed solely to avoid or delay the inevitable. Nor are the issues raised on appeal simply a straightforward application of established law. Neither party identified any California authority which clearly establishes that loan servicers are not parties to a loan or deed of trust. The existence of several Federal cases resolving related issues suggests Brooks is not alone in his pursuit of the theory advanced here. This case does not meet the objective test for sanctions; not every reasonable attorney would agree the appeal is totally and completely without merit. (*Flaherty*, *supra*, 31 Cal.3d at p. 650.)

Our reluctance to impose sanctions in this case echoes the words of caution by our Supreme Court in *Flaherty*. The punishment of sanctions "should be used most sparingly to deter only the most egregious conduct" and avoid chilling litigants' counsel from raising reasoned arguments at modifying, reversing, or extending the law. (*Flaherty*, *supra*, 31 Cal.3d at p. 651.) "An appeal that is simply without merit is *not* by definition frivolous and should not incur sanctions. Counsel should not be deterred from filing such appeals out of a fear of reprisals." (*Id*. at p. 650.)

Accordingly, Quantum's motion for sanctions is denied.

DISPOSITION

The judgment is affirmed. Respondent's motion for sanctions is denied. Respondent is awarded its costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

ROTHSCHILD, J.